

UTAH SCHOOL LAW UPDATE

Utah State Office of Education

October 2011

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Service Animals in Schools: Dogs and Horses OH MY!!

The beginning of this new school year has provided some local education agencies (LEAs) with the opportunity

to see service animals for students at work in schools for the first time. When



requested for educational reasons, inclusion of the service animal in the school environment is certainly an appropriate matter for the student's IEP or Section 504 team to consider. When requested for non-educational reasons, the service animal in the school environment is determined by the school division's administrators based on the school division's policy and procedures.

The definition of a "service animal" is finally clear. According to the regulations: A "service animal" is any dog that is individually trained to do work or perform tasks for people with disabilities (28 CFR 35.104).

Schools are not responsible for the care or supervision of a service animal (28 CFR 136 (e)). The service animal:

- must be under the control of its handler,
- shall have a harness, leash, or other tether,

unless the handler is unable because of a disability to use a harness. leash, or other tether, or the use of a harness. leash, or other tether would interfere with the service animal's safe. effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control. Examples of alternative mechanisms for control are voice control, signals, or other effective means (28 CFR 35.136(d)).

A service animal may be excluded from a school building, school function, or school sponsored activity if permitting the service animal would fundamentally alter the nature of the service, program, or activity (Official Commentary to ADA Regulations, 28 CFR Part 35).

A "**service animal**" may also be a miniature horse that has been individually trained to do work or perform tasks for people with disabilities (28 CFR 35.136(i)(A)).

Four assessment factors have been provided in order to assist entities covered by the ADA in modifying their policies to accommodate miniature horses where reasonable. The assessment factors are: (1)whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise the legitimate safety requirements necessary for safe operation of the facility.

Service animals are not pets. Therefore a "no pet" policy cannot be applied to a service animal. Most people are familiar with the work of guide dogs for the blind and would not give a second thought to a seeing-eye dog accompanying its master in public settings. Animal lovers may have had the opportunity to encounter a seeing-eye dog at work and politely asked permission to pet the dog only to be informed that the dog is working and is not to be distracted from her work.

The job or tasks the animals have been trained to perform must be directly related to the person's disability. Examples of the type of work performed by service animals include, but are not limited to:

- alerting people who are deaf to the presence of people or sounds;
- pulling a wheelchair;

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UPPAC CASES

The Utah State Board of Education permanently revoked Jeremy Page Flygare's Utah Educator license. The revocation results from Mr. Flygare pleading guilty to two felony counts of forcible sexual abuse on a minor.

Recent Education Case

J.D.B. v. North Carolina, 546 U.S. Supreme Court, 2011. In June, 2011, the United States Supreme Court decided that *Miranda* rights are not limited to adults, and that even students in school, when being questioned by law enforcement, must be given the *Miranda* warnings.

"Miranda warning" refers to the doctrine that a criminal suspect in policy custody must be informed of certain constitutional rights before interrogation. The subject must be advised of the right to remain silent, the right to an attorney during questioning, and the right to have an attorney appointed if the suspect cannot afford one. If a suspect is not advised of these rights, the interrogation cannot be used against the suspect at trial.

In this particular case, J.D.B., a 13 year old 7th grade student was questioned by police after he was seen near the site of two home break-ins. A few days later, J.D.B. was seen at school with a digital camera matching one of the stolen items, and the SRO officer at J.D.B.'s school pulled J.D.B. from his classroom into a closed-door conference room, where the officer, school administrators, and an investigator questioned him for at least 30 minutes.

J.D.B. was not given *Miranda* warnings, nor was he told he was free to leave, or that

he could call his guardian. Initially, J.D.B. denied involvement in the theft, but then later confessed when officials told him about the prospect of juvenile detention and that telling the truth is the right thing to do. Not until this point did the investigator tell the student he could refuse to answer the questions and was free to leave. Then J.D.B. provided further details, including the location of the stolen items, and also wrote a statement at the investigator's request.

At the end of the school day, J.D.B. went home on the bus. Shortly thereafter, J.D.B. was charged with breaking and entering, and with larceny. His lawyer moved to suppress his statement and evidence taken therefrom on the ground that J.D.B. had not been afforded *Miranda* warnings prior to interrogation.

The law requires that *Miranda* warnings be given when a suspect is in custody and is being interrogated. The question of whether J.D.B. was "in custody" was at the heart of this case. The Supreme Court has determined a person is "in custody" if based on the circumstances and setting surrounding the interrogation, a reasonable person would have felt he or she is not at liberty to terminate the interrogation and

leave. The analysis has always been an objective analysis, and police need not taken into account whether this particular suspect subjectively believed he or she could leave, but whether a reasonable person might feel constrained to stay put.

In this case, for the first time, the Court held that police must consider the age of the child in making the custody determination and assessing whether the suspect felt free to leave. The Court reasoned, "It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave."

Bottom line: if you have a student being questioned by the school district's/school's SRO in an environment that a student likely would not feel free to walk away from, make sure the student is afford his *Miranda* rights prior to any interrogation.

This decision makes it more difficult for school administrators to decide if school resource officers should be included in student interrogations. It makes the definition of a "school resource officer" more crucial. *More on this in future issues*.

UPPAC Case of the Month

It's true, coaches are not accountants, but as it turns out, coaches typically handle more money than any other educator at the school. The amount of money it takes to run a program like football or baseball is well into the tens of thousands of dollars each year, from purchasing uniforms, to equipment, to tournament fees. Fundraisers are held, discount cards are sold, summer camps for athletes are put on, and the money flows in. Without a clear and transparent system of accounting, it is easy to lose track of where all the money is going. And it's easy for a distraught parent or two-from whom much of the money is coming—to fling charges of dishonesty, incompetence, and even embezzlement.

With the help of USOE's internal auditor, the following are some basic "coach accounting" do's and don'ts that coaches/extracurricular activity advisors should carefully consider:

- ALL CASH AND CHECKS COLLECTED SHOULD BE DEPOSITED. NO EXCEPTIONS!
- 2. All funds collected for your sport or activity become public funds, and as such must follow cash receipt and purchasing guidelines established by the State and the LEA.
- 3. The only time it is OK to establish a bank account outside of the LEA control is when your LEA allows for the establishment of a booster club, and the proper policies and procedures are followed. A booster club account should be strictly booster club; no coach or relative of the coach should be on the account and funds going in and out of the account should be used strictly for booster club funds. There should be no co-mingling of the booster club account and the school account.
- 4. Fees charged should be properly approved through the local school

- board at the beginning of the school year, and published in the fee schedule. If what you are charging is not on the fee schedule, it is highly likely you should not be charging it.
- 5. Payments to fundraising vendors, purchases of concessions, food, athletic equipment and gear, coach stipends or any other invoice should never be made out of cash proceeds that have not been deposited. All payments should be properly reported and paid through the activity account at the school.

While coaches are not professional accountants, they should be trained and trained again, and districts and schools should be vigilant about enforcing policies and protocols when it comes to collecting and spending money. A solid system of internal controls will protect both the funds coaches/advisors manage and protect the educators themselves.

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Services Animals in School (cont.)

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- providing non-violent protection or rescue work, such as preventing a student from running into the street;
- alerting and protecting a person who is having a seizure;
- reminding a person to take prescribed medications;
- calming a person suffering from an anxiety attack;
- providing stability, retrieving items, and/or opening doors for a mobilityimpaired individual; and
- assisting with standing or sitting.

The regulations explicitly state that animals whose function is to provide comfort or emotional support do not fall within the definition of a service animal. However, the water is muddied by the fact

that, while the LEA may ask (1) whether the service animal is required because of a disability and (2) what work or task the service animal has been trained to perform, the LEA may not require documentation or certification of the animal's training. 28, CFR 35 136(f).

LEAs may not refuse or remove a service animal due to the allergies of others. The Department of Justice has stated that allergies and fear of dogs are not valid reasons for refusing to allow service animals to accompany people with disabilities in areas where the public is normally allowed to go. The Department suggests that, in these situations, dueling disabilities should be accommodated by assigning students to different locations within the room or different rooms in the facility.

While astute educators welcome the value service animals provide to

students, they also anticipate potential logistic and legal challenges associated with having these animals in schools. The new regulations will guide LEAs in the process of modifying policies, practices, or procedures to permit the use of service animals by individuals with disabilities (28 CFR 15.136(a)).

More information regarding service animals is available at www.ADA.gov.

—Lisa Arbogast, M.Ed. J.D., Special Education Coordinator, Law and Policy, USOE

"A 'service animal' is a dog or a miniature horse that is individually trained to do work or perform tasks for people with disabilities."

Your Questions

Q: A school in our district has a very strict "no-cell phone policy" that all students/

parents are asked to sign at the beginning of the school year. The policy states that a first time offense will result in confiscation of the cell phone for a day; a second offense will result in the



confiscation of the phone for the remainder of the school year. A parent has threatened to sue on the grounds that this policy is unconstitutional. Does the parent have a case?

A: No. If a parent signs an agreement to abide by a policy, there are no constitutional issues at play; it is a contractual matter that has been agreed upon between the district and the parent. If a parent refuses to sign on the basis that the policy itself is unconstitutional, he will have difficulty establishing which constitutional principle is being violated. Schools have great

What do you do when...?

latitude to establish policies that serve to minimize disruptions and maintain a safe environment for all students. If the district has determined that cell phones are disruptive to the safe learning environment, it can certainly create and enforce a no-cell phone policy with consequences tied to the violation.

- Q. I am a high school teacher and I was recently disciplined at my school for a minor drug offense—on my personal time. The police were involved, but criminal charges are pending. I was notified that the district will notify the Professional Practices committee of the state. Will my educator license be suspended for this minor incident? Do I need an attorney?
- **A.** If your employer (a school district or charter school) notified the Utah Professional Practices Advisory

Commission (UPPAC) of the drug offense, there will be an investigation of your licensing status. You will be notified in writing by UPPAC that an investigation will take place. You will be informed that you may be represented by an attorney and, if you belong to UEA or another educator association, you have paid for legal representation through that membership.

You should notify the UPPAC office immediately if you will be represented by an attorney. You have that right and it is most often helpful, but representation is not necessary. Please note, if you are represented by an attorney, the attorney should contact you about every decision and keep you fairly and honestly informed about all options regarding your teaching license. The criminal process and the license investigation process proceed separately. They may proceed on parallel tracks, but the outcomes may

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education. sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions (cont.)

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differ. An attorney representing you is your zealous advocate, but this does not mean that UPPAC is your adversary or your enemy. You should work closely with your attorney so that you understand the licensing discipline options, as well as you understand and follow any criminal proceedings. Attorneys who work fairly with UPPAC and who respond promptly and professionally to correspondence with UPPAC further their clients' interest. If a license suspension is likely, an attorney who is attentive to his client and who is knowledgeable about the process can arrange for a license suspension to begin as soon as possible to facilitate the educator/client's rehabilitation as a teacher and return to the profession.

More about the issue of effective representation before UPPAC-with examples of those who helped and those who hindered--in next month's Newsletter.

Q. I am a sixth grade teacher in a mid-size school district. I was cited over the weekend for a DUI. I don't believe that I should have been stopped by the police and my attorney girl friend who was with me said that the police had no right to require me to take a breathalyzer to determine alcohol use. I plan to challenge the citation. I was definitely not arrested. I think I have heard something about a requirement to tell my employer-XYZ School District.

A. State Board of Education Rule 277-516 requires educators who are arrested or cited

(anything that involves taking fingerprints) to report an arrest for sex offenses, any matters involving alleged drugrelated offenses, any matters involving alleged

harassment, etc.) within 48 hours or as soon

as possible to the district superintendent/ charter school director. The superintendent/director must report to the State Office of Education within 48 hours of receipt of the information. This certainly does NOT mean that the individual cited or arrested will lose her license. But the incident will be expeditiously reviewed. This report is required regardless of the educator's intent to challenge the arrest/citation in further criminal or administrative proceedings.

alcohol-related offenses and any matters included under "offenses against the person" (domestic abuse/violence, assault, kidnapping, custodial interference,

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